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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Dated: December 21, 1967

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No._____

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OCTOBER TERM, 1967

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on October 27, 1967, after remand of this case by this Court to the trial court.

OPINIONS BELOW AND PRIOR OPINIONS OF THE COURT

This Court's prior decision, *National Dairy Products Corporation* v. *United States,* vacating the judgment of the United States Court of Appeals for the Eighth Circuit and remanding the case to the district court for further consideration in light of *Dennis* v. *United States,* 384 U.S. 855 (1966), is reported at 384 U.S. 883 (1966) and is reproduced beginning at page A-81 of the Appendix hereto.* The opinion of the district court denying petitioner's post-remand motion for a new trial in the light of *Dennis* is reported at

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* Appendix references are hereafter cited "App. A- ...".

262 F. Supp. 447 (W.D. Mo. Jan. 10, 1967) (App. A-15). The opinion of the Court of Appeals, affirming in part and reversing in part this judgment of the district court, is unofficially reported in 5 Trade Reg. Rep. (1967 Trade Cas.) ¶ 72,254 (App. A-1). This Court's prior opinion, *United States* v. *National Dairy Products Corporation*, upholding the constitutionality of Section 3 of the Robinson-Patman Act, is reported at 372 U.S. 29 (1963) (App. A-144).[1]

JURISDICTION

The judgment of the Court of Appeals was dated and entered October 27, 1967 (App. A-13). A timely petition for rehearing, filed November 16, 1967, was denied on November 21, 1967 (App. A-14). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it is contrary to the principles enunciated in *Dennis* and followed in *United States* v. *Youngblood*, 379 F.2d 365 (2d Cir. June 21, 1967); *Cargill* v. *United States*, 381 F.2d 849 (10th Cir. Sept. 6, 1967); and *Worthy* v. *United States*, 383 F.2d 524 (D.C. Cir. Aug. 11, 1967), for a Court of Appeals to hold that it is not reversible error for a trial court to deny to a defendant inspection of grand jury transcripts used by the government to refresh the recollections of important witnesses on the ground that there is other evidence to support the conviction and the

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1. Prior opinions of the Court of Appeals and of the district court are National Dairy Products Corporation v. United States, 350 F.2d 321 (8th Cir. 1965) (App. A-83) and United States v. National Dairy Products Corporation, 231 F.Supp. 663 (W.D. Mo. 1964) (App. A-119).

refreshment procedure does not adduce substantial evidence helpful to the government.

2. Whether, in a multi-count indictment, the reversible error found as to some counts by the Court of Appeals in the denial to a defendant of inspection of portions of grand jury testimony used by the government to refresh the recollections of important witnesses on questions of intent is reversible error as to all counts, where the same basic intent charge was a key issue in all counts.

3. Whether petitioner was denied its constitutional rights to a fair trial and to confront the witnesses against it when, following government counsel's reading of portions of their grand jury testimony for purposes of refreshment, important witnesses adopted portions of the testimony so read, although not refreshed, and the trial court denied to defense counsel inspection of the portions read and other portions relating to the same subject matter.

4. Whether courts below, following remand of this action for further consideration in light of *Dennis,* misconstrued and misapplied the mandate of this Court and also disregarded the rule of *O'Connor* v. *Ohio,* 385 U.S. 92 (1966), in holding that petitioner waived its right to inspect grand jury transcripts not used by the government at trial for purposes of refreshment of important government witnesses, disclosure of which petitioner had not requested in reliance upon pre-*Dennis* decisions of this Court and of the Court of Appeals for the Circuit in which the case was tried.

5. Whether the trial court in instructions relating to petitioner's claimed criminal violations of Section 3 of the Robinson-Patman Act, in allegedly selling milk at unreasonably low prices for the purpose of destroying competition, misapplied the prior decision of this Court (*United States*

v. *National Dairy Products Corporation*, 372 U.S. 29 (1963) (App. A-144)), in that such instructions, over defense objections, (a) failed to charge that "specific" intent to destroy competition is a necessary element of the alleged offense and may not be presumed, and (b) placed upon petitioner the burden of justifying its challenged prices on the basis of an erroneously stated "good faith meeting competition defense" drawn from Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, applicable in civil price discrimination cases.

STATUTES AND RULES INVOLVED

Pertinent portions of the Fifth and Sixth Amendments to the Constitution; Section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958); Section 3 of the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U.S.C. 13a (1958); Sections 2(a) and 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. §§ 13(a) and 13(b) (1958), and Rule 6(e) of the Federal Rules of Criminal Procedure (18 U.S.C.), involved herein, are set forth in the Appendix (App. A-153).

STATEMENT

Through its Sealtest Foods Division ("Sealtest"), petitioner engages, among other things, in the processing and distribution of fluid milk. From Sealtest's Kansas City, Missouri, milk processing plant, petitioner distributes milk primarily in paper containers on company-owned routes in the greater Kansas City area and through independent distributors in rural areas in western Missouri and eastern Kansas in competition with numerous other dairy companies, large and small, selling milk in paper and glass containers, including glass gallon jugs.

On September 16, 1959, an indictment containing fifteen counts was returned by a grand jury in Kansas City, Missouri.[2] Eight counts charged that petitioner engaged in conspiracies to fix prices and eliminate competition in the sale of milk in portions of the above-described area in violation of Section 1 of the Sherman Act, and seven counts charged the substantive offense of selling milk below cost for the purpose of destroying competition in violation of Section 3 of the Robinson-Patman Act.[3] Trial began before a jury on June 13, 1963, and on August 16, 1963, after nearly three days of deliberation, the jury returned verdicts of guilty on the first thirteen counts and not guilty on the last two counts.

Petitioner appealed to the Eighth Circuit Court of Appeals, urging among other grounds for reversal (1) that the trial court erred in denying petitioner's motions for the production of portions of the grand jury transcripts which the government had used for refreshment of seven important witnesses[4] (and other related portions thereof),

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2. Petitioner was a defendant in all counts; Raymond J. Wise, petitioner's Vice President in charge of its Sealtest Division's Central Division, was a defendant only in Counts 11-13. Various other dairy concerns and individuals were named in the indictment and in the government's bills of particulars as alleged co-conspirators, but not as defendants.

3. One Sherman Act charge (Count 11) was not accompanied by a corresponding Robinson-Patman Act charge. Counts 11 and 12 under the Sherman Act and Count 13 under the Robinson-Patman Act dealt with the greater Kansas City area; the remaining counts (in pairs of one Sherman Act and one Robinson-Patman Act count) dealt with petitioner's sales to its independent distributors in six separate non-metropolitan areas.

4. These "refreshment witnesses" are identified, and pertinent portions of their testimony, together with petitioner's motions for disclosure and the court's rulings thereon, are set forth at App. A-156—A-279.

and (2) that the trial court's instructions on the Robinson-Patman Act charges embraced an erroneous interpretation of Section 3 of the Robinson-Patman Act and of this Court's decision in a prior government appeal.[5] On August 27, 1965, the Court of Appeals affirmed the judgments of the District Court (App. A-117).

Thereafter, petitioner filed a petition for a writ of certiorari in this Court. This petition was granted, the judgment of the Court of Appeals was vacated and the cause was remanded for further consideration in light of *Dennis* v. *United States*, 384 U.S. 855 (1966) (App. A-81).

Upon remand, the trial court accepted briefs and heard oral argument on the application of *Dennis* to this case. During the course of these proceedings, petitioner filed a motion for a new trial (App. A-71) in which it realleged as a basis therefor the trial court's denial of petitioner's motions to inspect portions of the grand jury testimony used by the government to refresh the recollections of the seven important trial witnesses mentioned above. It also urged that under *Dennis* petitioner should have a new trial at which it would be entitled to inspect the grand jury testimony of thirty important government witnesses, whose grand jury transcripts were not used for refreshment at the trial, but were, in many cases, used by the government to prepare the witnesses prior to trial.[6] The trial court found no error in his rulings at trial, denied petitioner's motion, and re-entered the judgments on Counts 1-13 (App. A-65, A-70).

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5. United States v. National Dairy Products Corporation, 372 U.S. 29 (1963) (App. A-144).

6. These witnesses whose grand jury transcripts were not used by the government at trial are the "non-refreshment witnesses." A description of them is set forth in petitioner's post-remand motion for a new trial (App. A-73—A-80).

On appeal from this post-remand judgment, the Court of Appeals for the Eighth Circuit agreed with petitioner that the trial court's refusal to order the production of the requested portions of the grand jury transcript used for refreshment was error, but it reversed the trial court only as to Counts 11-13 (Kansas City counts), sustaining the trial court as to Counts 1-10 (distributor counts) on the ground that other evidence supported the verdicts on the latter counts and that the refreshment process had elicited no evidence which was demonstrably prejudicial to the defense on those counts (App. A-13).

The Government's Use of the Grand Jury Transcripts

All counts of the indictment contained the same fundamental charge that petitioner's pricing policy was a predatory one which was intended to coerce competitors and eliminate gallon jug competition.[7] The government's proof at trial consisted largely of testimony of dairy executives and distributors (including personnel of petitioner and

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7. Arguing in support of consideration of intent evidence without regard to the count in which it was offered, the government urged: "The necessary prerequisite [for joinder] is that the offense be of the same or similar character, or be part of the . . . same plan. The indictment and the evidence in the instant case indicate that the crimes joined are of similar character, and that the bulk of them are a part of National's plan to eliminate or curtail the gallon jug competition by sharply narrowing or eliminating the 'spread.'" It further emphasized that "all of the evidence heretofore introduced during its Presentation relating to the Kansas City counts is by no means intended to be limited to the Kansas City counts. . . ." See Government's Memorandum Concerning the Relationship Between Different Counts in the Indictment and Evidence Relating Thereto, appearing in volume VIII of the Pleadings at pages 1244 and 1246. (Pleadings references are hereafter cited "... Pl. ...".).

alleged co-conspirator concerns), as well as complaining dairy operators, many of whom testified as to declarations by petitioner's personnel having a direct bearing on the intent issue. In order to refresh the recollections of certain of these witnesses on "critical, incriminating facts,"[8] the prosecution on twenty-four occasions used the grand jury transcript upon its direct examination of five important government witnesses (Augenstein, Flanagan, Crimmins, Gilmore and Gardner — see App. A-158—A-261) and during its cross-examination of two important defense witnesses (Baird and Stewart—App. A-261—A-279). Petitioner moved to inspect portions of the grand jury transcripts so used and other portions related thereto, but its motions in all cases were denied.

Among the refreshment witnesses, Stewart, petitioner's general manager, Flanagan, its sales manager, and Baird, its milk sales manager, were the responsible employees of petitioner in all the indictment areas. Baird and Stewart were defense witnesses as to all counts; Flanagan was called by the government and was questioned at length, primarily as to Counts 11-13. All three were alleged co-conspirators in each of the distributor areas as well as in Kansas City. They played leading parts in the events at issue in all counts, and this was reflected both in their own testimony[9] and in the testimony given by many other wit-

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8. Brief for Appellee United States, p. 80, National Dairy Products Corporation v. United States, 350 F.2d 321 (8th Cir. 1965).

9. Baird, for example, gave the recent history of Sealtest's distributor business, described the competitive nature of the milk business in the distributor areas, and explained Sealtest's arrangement of selling to distributors first at a "dock price" and later of selling at a specific margin below the going wholesale (*i.e.*, into-store) prices in their respective markets (R. 5082-84, 5105-22), Sealtest's selling policies (R. 5128-30), and the limited

nesses[10] concerning their activities and statements. In final argument, government counsel again and again made references to the parts played by these three witnesses in matters at issue in Counts 1-10 (R. 6852, 6857, 6867, 6875-77, 6883, 6895-96, 6899-6900).

In addition, all the refreshment witnesses testified as to matters which bore upon a key issue common to all the counts — petitioner's basic motive or intent in its pricing. The government, to show petitioner's basic intent was predatory in all counts, sought to establish (1) that petitioner devised and conspiratorially put into effect plans to reduce prices to destroy competition and, after that had been accomplished, to raise prices;[11] (2) that petitioner's alleged "phi-

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authority of the distributor sales supervisors (R. 5130-32). He described the competitive situation in the Kansas City area, and reviewed in specific detail Sealtest's reasons for its various price changes in 1957-1958 (R. 5177-5301, 5335-78). He also testified specifically as to Sealtest's pricing in Mexico-Centralia (Counts 7 and 8), and in Sedalia (Counts 3 and 4) (R. 5140-41, 5174-75).

10. For example, numerous prosecution witnesses from the "distributor areas" testified concerning Flanagan and his activities: under Counts 1 and 2, Sealtest distributor Martin (R. 3329-32, 3338, 3368-71), and competitors Theno (R. 3407-08) and Casper (R. 3581); under Counts 3 and 4, distributor Newton (R. 3870-75, 3889-93, 3902, 3904), and competitors Greer (R. 3930-42, 3945) and Freese (R. 3985-87); under Counts 5 and 6, distributor Heyer (R. 4057-60, 4070); under Counts 7 and 8, distributor Isaacs (R. 2920-21), and competitors Anthony Weber (R. 3029) and Dan Weber (R. 2973-74). See also the government's bills of particulars, III Pl. 422, 424, 428.

11. Such an alleged scheme, specifically charged as being the substance of the offense in Count 12, was called the "Wise plan" by government counsel. The reduced prices in the Kansas City area in the summer of 1958, allegedly resulting from the scheme's first step, formed the basis for the charge in Count 13, and was one of the basic issues in Counts 1 and 2 involving pricing in the same period in the Paola, Kansas, area (see App. A-172 n). Count 11

losophy" in competing with the gallon jugs was to meet the gallon jug price of petitioner's competitors with two half-gallons in paper cartons at the same price, and that this "philosophy" was predatory and not legitimately competitive because paper cartons resulted in greater cost to petitioner and had greater consumer appeal;[12] and (3) that the gallon jug operators were not in fact regarded by petitioner as a significant factor in the market and, therefore, that petitioner's claim that its pricing was defensive to protect its volume was spurious.[13]

Government counsel utilized portions of their grand jury testimony in an effort to refresh the recollections of Flanagan, Augenstein, Gardner, Crimmins, Gilmore and Stewart on aspects of intent item (1), above; Flanagan and Augenstein on intent item (2); and Baird on intent item (3) (see notes 11-13, *supra*).

Concededly, the government achieved three instances of actual refreshment, and six more instances where the witnesses, although not refreshed, adopted their grand jury jury testimony, or a total of nine instances of successful use of the grand jury transcript by the government before the trial jury.[14]

The Trial Court's Instructions on Intent

Although the five government refreshment witnesses testified primarily with respect to events at issue in Counts

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involved similar conspiracy charges in connection with a milk price war in the fall of 1957. See also App. A-183—A-187, A-191—A-192, A-197—A-199, A-213—A-214, A-243—A-244, A-255—A-256.

12. See App. A-177—A-179, A-223—A-224.

13. See App. A-172—A-179, A-262—A-265.

14. Brief for Appellee United States, p. 36, National Dairy Products Corporation v. United States, 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,254 (8th Cir. Oct. 27, 1967).

11-13 and Counts 1 and 2 (the two defense witnesses refreshed by the government testified with respect to all counts), the trial court's instructions to the jury had the effect of coalescing all counts by making a witness' testimony directly applicable to the intent issue in the other counts.[15] Charging the jury that, in general, it must consider evidence only under the particular count as to which it was received, the trial court explained that there was an exception to this rule which permitted the jury to consider "evidence of any earlier occurrences received in . . . one particular count that might help explain the intent of a defendant in another count . . ." (R. 7112, App. A-281—A-282). Explaining that this exception was broad enough to permit consideration of a general course of conduct "even before the period of indictment," the trial court gave the illustration that in considering any conspiracy count, the jury could "consider also evidence of earlier occurrences pertaining to another . . . [conspiracy] count which [the jury] might find would bear also upon . . . [petitioner's] intent in the count under consideration" (R. 7113, App. A-282).

The Non-Refreshment Witnesses

Petitioner's post-remand motion for a new trial (App. A-71), denied by the trial court (App. A-65), urged as an additional ground for the new trial that under *Dennis* and by virtue of the Court's specific remand of the case for consideration in light of *Dennis,* petitioner was entitled to a new trial at which it would be permitted to inspect the grand jury testimony of thirty important government witnesses who testified before the grand jury, but whose

15. The full text of the trial court's instructions on this issue is set forth in the Appendix (App. A-280—A-283).

transcripts the government did not use for refreshment at trial.

The motion set forth in detail the factors which brought the disclosure of the testimony of these thirty witnesses within the *Dennis* rule.[16] The trial court denied the motion without opinion and the Court of Appeals affirmed on the ground that the motion was not timely, despite this Court's remand order (App. A-11—A-12).

The Robinson-Patman Act Instructions

In the government's prior appeal in this case, this Court sustained the constitutionality of Section 3 of the Robinson-Patman Act against petitioner's charge of unconstitutional vagueness, holding that, at least as to conduct specifically challenged in the indictment, the statute gave adequate warning (*United States* v. *National Dairy Products Corporation*, 372 U.S. 29, 32-33 (1963) (App. A-147—A-148)). In the course of its opinion, the Court took considerable care to detail the substantial proof which the government would have to adduce to win a conviction, prescribing the elements of this burden in terms of the construction of the statute which the Court had adopted to preserve the statute's constitutionality.

Under this construction, the Court would require the prosecution to prove "sales made below cost without legitimate commercial objective and with specific intent to destroy competition" (372 U.S. at 37, App. A-151—A-

16. App. A-72—A-79. Twenty of the thirty non-refreshment witnesses testified solely concerning Counts 1-10. Thirteen of the thirty were principals in or employees of competing companies which have filed treble damage suits against petitioner; four others were, according to the government's bills of particulars and their trial testimony, injured by the alleged acts of petitioner.

152).[17] But, despite this clear statement, the trial court instructed the jury that "the law presumes that persons must be held to have intended the necessary and direct consequences of their acts" (App. A-296 n.), and that they are chargeable for consequences reasonably to be anticipated (App. A-296); he declined to charge, as requested by petitioner, that "the statute requires something more than merely intending normal consequences of an act . . . [that what is required is] proof of specific intent to destroy competition."[18]

The trial judge also instructed the jury that "sales below cost are not condemned if made in furtherance of a need to meet a lawful, equally low price of a competitor" (App. A-288). He declined, however, to instruct, as requested by petitioner, that to be "unreasonably low" under Section 3, prices must be shown to be "below cost and . . . not established . . . for any legitimate business purpose," or that petitioner must be acquitted if its challenged sales were made "in good faith to meet . . . competition" (IX Pl. 1549, 1557). The court disparagingly commented that testimony to the effect that a "company's pricing policy was justified by meeting competition . . . [is] simply a conclusion on the part of the witness" (App. A-288), and a "mechanical word formula" (App. A-289). He instructed that the "defense of meeting competition" protected petitioner (implying that it was petitioner's burden to prove), provided that the jury "found as a fact that . . . [petitioner] offered its reduced prices simply to meet the law-

17. Earlier in its opinion, the Court had emphasized the necessity of the government's proving two "separate, though related, statutory elements"—the objective below cost sale and the subjective specific intent to destroy competition (372 U. S. at 35, App. A-150).

18. See IX Pl. 1546, 1553.

fully low price of a competitor, and [it] . . . found in fact that a lawfully low price of a competitor was in existence . . ." (App. A-290). He further qualified this "defense," instructing the jury to decide if petitioner "in fact undercut" gallon jug prices by pricing its half-gallons "at the same price . . . or so close to the gallon jug as to be considered below what the government contends was an existing differential under normal . . . conditions" (App. A-292—A-293), and he confused the issue by comparing the milk business to the gasoline business where, he asserted, there is a "known differential" (App. A-292).

Petitioner's requested instructions concerning "specific intent" and "meeting competition" (IX Pl. 1546, 1548, 1550-55, 1557, 1559) were refused by the trial court in favor of his "own instruction" in a pre-instruction conference (see R. 6744). Following the charge to the jury, the trial court indicated generally that he wanted only "additional objections" not previously ruled upon (R. 7203). Petitioner thereafter made objections to the instructions given on "specific intent"; "lawful" competitive price "in fact . . . in existence"; the belittling references to "mechanical word formulas"; and the confusing references to the "established differential" in the gasoline business (R. 7204-05, 7225-32, 7235-36, 7238). These objections were overruled (R. 7251-53).

REASONS FOR GRANTING THE WRIT

The decision of the court below is contrary to the principles of *Dennis* v. *United States,* 384 U.S. 855 (1966). It not only fails to comply with this Court's mandate to reconsider this case in light of *Dennis,* but it is in conflict with the decisions of three other circuits as to the proper application of that case.

The holdings below also misapply this Court's prior decision in this case upholding the constitutionality of Section 3 of the Robinson-Patman Act, and thereby raise serious questions as to its administration.

Certiorari should be granted in this case in order that the Court may resolve the conflict concerning the application of *Dennis,* clarify the standards governing Section 3 of the Robinson-Patman Act, and enforce its prior decisions in this case.

I. The Court of Appeals Failed to Apply the Standards of the Dennis Case in Affirming Counts 1-10, Contrary to This Court's Mandate and in Conflict with Decisions in Three Other Circuits

The Court of Appeals decision in this case would engraft a significant exception on the rule of the *Dennis* case. It would legitimatize the non-disclosure to a defendant of the grand jury testimony of important trial witnesses for which a defendant has a "particularized need" if, at the end of the trial, it is found that other evidence supports the verdict and use of the grand jury transcript was not of substantial aid to the government. Such an exception would be impossible to administer during trial and would totally confuse the procedure governing disclosure of grand jury transcripts in federal criminal actions.

In reversing on Counts 11-13, the Court of Appeals followed the rationale of *Dennis* v. *United States,* 384 U.S. 855, 875 (1966), and the decisions in other post-*Dennis* cases[20] that a defendant's particularized need to inspect

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20. United States v. Youngblood, 379 F.2d 365 (2d Cir. June 21, 1967); Cargill v. United States, 381 F.2d 849 (10th Cir. Sept. 6, 1967); Worthy v. United States, 383 F.2d 524 (D.C. Cir. Aug. 11, 1967); Lucignano v. United States, No. 21,559 (E.D. Pa. Sept. 13, 1966).

the grand jury testimony of important witnesses arises from the circumstances (for example, from the fact that the government uses the grand jury transcript for impeachment or refreshment of important witnesses) and that, once particularized need appears, the defense is entitled to a new trial if disclosure is denied.[21] The court recognized that foreclosure of petitioner from a source of evidence was the basic error and that the sufficiency of the evidence to support the conviction on these counts, or the quantum of help, if any, received by the government from the refreshment procedure, was irrelevant (see App. A-4—A-6). However, when it affirmed the conviction of petitioner on Counts 1-10, the court departed from this majority rule and gave these irrelevant considerations decisive weight (see App. A-9—A-11).

It is clear from *Dennis* that a defendant's right to a new trial because of a trial court's erroneous refusal to order disclosure is not in any way affected by the sufficiency of other evidence to support a guilty verdict. This Court limited its review in *Dennis* to three questions, one being the grand jury point; it declined to consider the *Dennis* petitioner's contention that there was insufficient evidence to convict. And despite the holding by the lower court in that case that there was sufficient evidence to sustain the conviction,[22] this Court reversed on the grand jury point. Nor is there anything in *Dennis* to establish as a prerequisite to reversal a showing that the government was able through use of the grand jury transcript to adduce damaging evidence, Indeed, *Dennis* is to the contrary, for there a new trial was ordered even though the government had made no

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21. See App. A-6—A-8, where the Court of Appeals discusses the post-*Dennis* cases.

22. Dennis v. United States, 346 F.2d 10 (10th Cir. 1965).

affirmative use of the transcript and adduced no evidence of any nature by virtue of the transcript. Thus, both the sufficiency of other evidence and the value to the government of the refreshment procedure was irrelevant and should have been ignored by the Court of Appeals when it affirmed Counts 1-10, as it ignored those factors in reversing Counts 11-13.

As this Court held in *Dennis,* the controlling consideration in a situation such as this is whether or not there is the possibility that *disclosure* might lead to evidence *useful to the defense,* and this determination, it was held, can be made only by defense counsel (384 U.S. at 875). In the instant case, the jury deliberated for three days before reaching a verdict of guilty on thirteen counts and not guilty on two. In light of the fact that five or six years had elapsed between the events at issue and the time of trial, no one can say that, had defense counsel been given access to the grand jury transcript, they could not have found material useful for additional refreshment, explaining or expanding upon testimony adduced by the government, and swinging the jury in petitioner's favor.

II. Owing to the Intent Issue Which Was Common to All Counts, the Error Found to Exist Was Not Confined to Counts 11-13, but Tainted Counts 1-10 as Well

The question of petitioner's intent, the basic and most hotly contested issue in the entire case, was common to all counts. The government contended that petitioner's plan was the same in the distributor areas and in the greater Kansas City area, to-wit, the disciplining or elimination of the gallon jug operators by conspiratorial, predatory pricing.[23] It urged that this plan was carried out in all the

23. See note 7, *supra.*

indictment areas in substantially the same period of time by the same personnel, principally Stewart, Flanagan and Baird, petitioner's Kansas City plant officials.[24] Petitioner, on the other hand, contended, and introduced evidence to show, that its pricing was purely defensive and designed to retain its business against competitors who had aggressively initiated the price decreases. On this bitterly-fought intent issue, both the refreshment witnesses themselves and the refreshment procedure had a substantial impact.

The trial court instructed the jury that it could consider evidence of prior conduct which had been received in one count in deciding petitioner's intent in other counts (App. A-280—A-284). Thus, although the testimony of five of the refreshment witnesses was offered in the first instance to make out the government's case in Counts 11-13, the government expressly stated that that testimony was not confined to those counts, and the fact that these witnesses did testify on the intent issue and some of them were actually refreshed on this point, coupled with the court's instruction which permitted the jury to consider their testimony on the intent question in the other counts, foreclosed any possibility that the error of non-disclosure found as to Counts 11-13 would not be equally applicable to Counts 1-10 (see pp. 8-10, *supra*). Of course, since two of the refreshment witnesses (Stewart and Baird) were defense witnesses who testified as to all counts, the error of non-disclosure of their testimony could in no event be said to be confined to Counts 11-13.

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24. The bills of particulars named each as a co-conspirator in all Sherman Act counts (III Pl. 422, 424, 428).

III. Petitioner Was Denied a Fair Trial, Contrary to the Fifth and Sixth Amendments to the Constitution, by Virtue of the Refreshment Procedure Utilized and the Trial Court's Refusal to Order Production of the Transcripts

In this case, the use of the grand jury transcript by the government and the trial court's refusal to order production thereof threatened the "very integrity of the fact-finding process"[25] and raised fundamental constitutional questions of fair trial and confrontation of witnesses guaranteed by the Fifth and Sixth Amendments.[26]

Compounding the intrinsic prejudice resulting from the one-sided availability of the transcripts, the procedure followed placed before the jury matter which was not in evidence, and denial of petitioner's motions for inspection made confrontation and cross-examination utterly impossible. Five of the refreshment witnesses adopted certain key portions of their grand jury testimony after testifying, following attempted refreshment, that they did not presently recollect the pertinent facts adopted.[27] Denying disclosure of the transcripts to petitioner for its possible use in further examination of the witnesses prevented any effective confrontation of the witnesses on the subject matter of the adopted testimony—including testimony on the intent issue—and deprived petitioner of its constitutional rights.

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25. Linkletter v. Walker, 381 U.S. 618, 639 (1965).

26. See Jencks v. United States, 353 U.S. 657 (1957) ("constitutional overtones" involved in one-sided availability of witnesses' statements in hands of government—see Palermo v. United States, 360 U.S. 343, 362-63 (1959) (concurring opinion of Mr. Justice Brennan)); Brady v. Maryland, 373 U.S. 83 (1963) (constitutional question involved in one-sided availability of "evidence favorable to an accused" in the hands of the government).

27. See App. A-199, A-213—A-214, A-220, A-246—A-247, A-253—A-254, A-259—A-261.

The principle is the same as that in *Robbins* v. *Small,* 371 F.2d 793 (1st Cir. Jan. 31, 1967), *cert. denied,* 386 U.S. 1033 (May 8, 1967). There a prosecutor examined a hostile prosecution witness with leading questions, utilizing a signed, extra-judicial statement made by the witness. In this manner, the prosecutor placed before the jury the contents of the prior statement, despite the witness' claim of his Fifth Amendment right against self-incrimination. The First Circuit Court of Appeals held that this procedure violated the defendant's constitutional rights to a fair trial and confrontation of witnesses in that it brought to the jury's attention the substance of a statement that was not in evidence and, therefore, not subject to cross-examination.

Robbins' parallel to this case is clear. In each case a defendant was foreclosed from cross-examining the witness about his prior statement—in *Robbins,* because the witness was claiming his Fifth Amendment right, and in the instant case, because the witness had no present recollection of facts which he had adopted, and petitioner could not cure the defective recollection by further refreshment because the transcript was not disclosed. In both cases "non-confrontation" matter was called to the jury's attention—in *Robbins,* from the statement, and here, from the grand jury transcript.

This procedure, coupled with the facts that (1) the Court of Appeals found error in the non-disclosure of the transcript as to Counts 11-13, (2) portions of the adopted testimony related to the intent question, and (3) the trial court's instruction permitted the jury to consider intent evidence—including the adopted testimony—in all counts, demonstrates that petitioner was deprived of its rights guaranteed by the Fifth and Sixth Amendments.[28]

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28. Petitioner urged this point in both courts below. The trial court dismissed the point, holding that no constitutional issue was involved, and the Court of Appeals ignored the point in its opinion.

IV. The Court of Appeals Misconstrued and Misapplied the Mandate of This Court and Disregarded the Rule in O'Connor v. Ohio in Holding That Petitioner Waived Its Right to Inspect the Grand Jury Testimony of Non-Refreshment Witnesses

Following remand of this case to the trial court, petitioner renewed its motion for a new trial, assigning as a ground (additional to those previously assigned in this Court in its prior petition for certiorari) that petitioner, in fairness, should have a trial at which it was accorded the right, consistent with *Dennis,* to inspect the grand jury testimony of thirty important government witnesses—most of them intensely hostile—who testified at trial, but whose transcripts were not requested by defendant because they had not been used at trial for refreshment. The record shows that government counsel utilized the transcripts of these witnesses' grand jury testimony to prepare them to testify against petitioner (see, *e.g.*, App. A-204—A-209) and, thus, had full advantage of the "exclusive access to a storehouse of relevant fact" condemned by this Court in *Dennis* (384 U.S. at 873). Nonetheless, the trial court denied petitioner's motion without comment and the Court of Appeals refused to review the merits of petitioner's motion on this point under the rule that a party may not assign error (other than "plain error") for the first time in the reviewing court.

This rule has no application here, because at the time of trial recent decisions of the Eighth Circuit Court of Appeals[29] precluded petitioner's obtaining disclosure of non-

29. Hance v. United States, 299 F.2d 389 (8th Cir. 1962); Brilliant v. United States, 297 F.2d 385 (8th Cir. 1962); Berry v. United States, 295 F.2d 192 (8th Cir. 1961), *cert. denied,* 368 U.S. 955 (1962). Moreover, under *Brilliant,* 297 F.2d at 391, a defendant was even precluded from asking the witness whether there was any such inconsistency.

refreshment witnesses' testimony without an advance showing of inconsistency between the trial and the grand jury testimony of those witnesses, a showing it was impossible for petitioner to undertake without access to the transcript. Petitioner was additionally inhibited from making such a motion by this Court's decisions in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683 (1958), and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (1959), both of which appeared to authorize much less extensive disclosure than was later ordered in *Dennis*. Moreover, in light of the trial court's consistent refusal to permit defense inspection of the grand jury transcript even where used by the government for refreshment, it was perfectly clear to petitioner's counsel that any such motion would have been completely futile.[30]

It was not until *Dennis* was decided, while the instant case was still pending before this Court on the original petition, that petitioner had any supportable basis for seeking disclosure of the grand jury testimony of the thirty non-refreshment witnesses. Because of this, the "waiver" rule applied by the Court of Appeals has no application here.

The rule which should have been applied is the one stated in *O'Connor* v. *Ohio*, 385 U.S. 92 (1966).[31] In that case this Court held that a defendant's failure to object to a long standing state court practice permitting a prosecutor to comment on a defendant's failure to testify did not strip him of

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30. At one point, the trial court commented "my view of the law is that I can't do that," *viz*, permit *any* disclosure (App. A-270; see also App. A-167).

31. *Accord*, England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422-23 (1964).

his right to attack that practice following its invalidation by this Court.[32]

The Court said (385 U.S. at 93):

> ". . . [O'Connor's] failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court."

Paraphrasing the Court:

> "[National's] . . . failure to object to a practice which [the Eighth Circuit] . . . had long allowed cannot strip [National] . . . of [its] . . . right to attack the practice following its invalidation by this Court."

The instant case calls even more strongly for the application of this rule. This Court restated the principles governing the disclosure of grand jury testimony in *Dennis*, and, on the same day, it specifically remanded this case, then pending on a petition for certiorari, for further consideration in light of *Dennis*. Thereafter, having for the first time a supportable basis for its motion, petitioner presented it to the trial court, who denied the motion. This ruling was appealed to the Court of Appeals which affirmed the trial court's ruling on a waiver theory, despite

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32. Although O'Connor had not raised this objection at trial, in his state court appeals, or in his first petition to the Supreme Court (he raised the point for the first time in a petition for rehearing of the Court's denial of the petition for certiorari (382 U.S. 286)), this Court considered the question and remanded the case to the Ohio Supreme Court for reconsideration in light of Griffin v. California, 380 U.S. 609 (1965), an intervening precedent wherein the Court changed the law. Upon remand, the Ohio court adhered to its prior ruling on the ground that no objection had been made at trial. In a *per curiam* opinion, this Court granted certiorari and summarily reversed the Ohio court (385 U.S. 92).

this Court's remand order requiring further consideration in light of *Dennis* and despite this Court's decision in *O'Connor*.

V. Both Lower Courts Misapplied This Court's Prior Opinion on the Robinson-Patman Act Charges in This Case, Thereby Permitting Petitioner To Be Convicted Under Standards Falling Below the Constitutional Requirements Established by the Court for This Case

On the trial, the trial court misapplied every key element of this Court's carefully delineated constitutional guidelines for this case set forth in its opinion in *United States* v. *National Dairy Products Corporation*, 372 U.S. 29 (1963), upholding the constitutionality of Section 3 of the Robinson-Patman Act. The results of these errors are three-fold. First, the petitioner has been deprived of the right to be tried according to the law of this case established by this Court in the prior appeal. Second, the interpretations adopted by the lower courts have raised serious legal issues on points which are basic to the administration of this law, and obedience to it. Third, by departing from this Court's standards for this case, the lower courts have carried the law into an unconstitutional application.

A. The Trial Court's Instructions Authorized Conviction upon a Presumed Intent, Rather Than Requiring a Finding of "Specific" Intent to Destroy Competition, Contrary to This Court's Prior Holding

Notwithstanding the fact that, on the constitutionality appeal, the government urged,[33] and this Court held, that the requirement for proof of a "specific" intent to destroy

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33. "The requirement of a specific, evil intent immediately eliminates the danger that anyone will be convicted of crime merely because his prices are found too low by a court or jury" (Government's Brief on Reargument, p. 23, United States v. National Dairy Products Corporation, 372 U.S. 29 (1963).

competition saved Section 3 from being unconstitutionally vague (372 U.S. at 35, 37, App. A-150, A-151—A-152), both courts below have treated as sufficient a mere "general" intent, allowed to be presumed by the jury from mere selling below cost and adverse effects upon some competitors.

It is no answer to say, as did the Court of Appeals, that the "jury was . . . required to make 'a finding of predatory intent beyond a reasonable doubt . . .'" (350 F.2d at 335; App. A-110), because, in instructing the jury under the Sherman Act *how it should determine intent,* the trial court instructed in terms of general intent: "the law presumes that persons must be held to have intended the necessary and direct consequence of their acts" (App. A-296 n.). This presumed intent concept was carried into the Robinson-Patman counts by the trial court when he gave the illustration in his Robinson-Patman charge that a workman casting a beam off a building in a city and causing harm to a person below "is dealt with as if he foresaw it, whether he does so in fact or not" (App. A-296). Nowhere did the trial court inform the jury that a different standard of determining intent was required to convict under the Robinson-Patman Act charges and nowhere did he charge the jury as to the more stringent requirements for proof or "specific" intent or instruct that it could not be presumed from the fact or the consequences of petitioner's challenged sales.[34]

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34. In its Brief in Opposition to petitioner's former petition for certiorari, the government did not deny that the jury was instructed in terms of "general intent" under the Sherman Act, and it was unable to cite a single instance where the jury was instructed that a different character of proof was required to establish "specific intent" (Brief in Opposition, pp. 18-19, National Dairy Products Corporation v. United States, 384 U.S. 833 (1966). Moreover, the trial court's repeated references in his Robinson-Patman Act charge to the alleged "effects" of petitioner's pricing could only heighten the jury's impression that the requisite intent could be presumed therefrom (see App. A-299—A-302).

Although proof of "general" intent is sufficient to establish a Sherman Act violation[35] (except attempt to monopolize), Section 3 of the Robinson-Patman Act can be rationalized with the national policy favoring vigorous price competition only if its prohibition is confined to low prices shown to have been adopted for the planned purpose of destroying competition. Otherwise—as in the case at bar—a "general" intent instruction authorizes the jury to impute the requisite evil motive to a seller from the facts that he knowingly dropped his prices and competitors were injured. He is dealt with not only "as if he foresaw" such injury—in the language of the trial court's example—but as if the elimination of or injury to competition was his objective in lowering his prices.

Under our system of law, a low-price seller should no more be convicted under Section 3 without proof of specific intent to destroy competition than should a large company be convicted of attempting to monopolize in violation of Section 2 of the Sherman Act without proof of specific intent to do so (*United States* v. *Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945)),[36] or a taker of property be convicted of theft without a showing of specific intent to steal (*Morissette* v. *United States*, 342 U.S. 246, 264 (1952)). The general intent instructions of the trial court deprived petitioner of a vital safeguard to its rights and, if permitted to stand as a precedent, will not only weaken the rights of those criminally tried in the future, but will threaten basic price competition — "the central nervous system of the economy" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59 (1949)).

B. In His Jury Instructions, the Trial Court Set Forth Incorrect Standards and an Erroneous Burden of Proof on the Issue of "Meeting Competition"

On the constitutionality appeal this Court stated ex-

35. *E.g.*, United States v. Patten, 226 U.S. 525, 543 (1913).

36. This portion of the *Alcoa* decision was cited with approval in United States v. Griffith, 334 U.S. 100, 106 (1948).

pressly that below-cost sales made for a "legitimate commercial objective" such as to meet "a lawful, equally low price of a competitor" would "neither be 'unreasonably low' nor made with predatory intent."[37] Since the issues of "unreasonably low" and "predatory intent" are indispensable elements in the alleged crime and, therefore, part of the government's burden of proof, the Court, of course, did not say that petitioner would have the burden to establish meeting competition, or any other facts, to *negative* them.

This Court did, however, define the charge to be proved under Section 3 as "sales made below cost without legitimate commercial objective and with specific intent to destroy competition" (372 U.S. at 37; App. A-151—A-152). At the very least, this holding means that if evidence should develop—as it did here in the government's own case[38]—that the allegedly unlawful low-price sales were made by the seller in order to meet competition, it was the government's burden to overcome that evidence.[39]

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37. 372 U.S. at 36-37; App. A-151. The Court also indicated that a below-cost sale was not unreasonably low if "mitigated by some acceptable business exigency" (*id.* at 33; App. A-148).

38. For example, evidence under Count 2 showed that before petitioner reduced prices to its Paola distributor, it had been informed that a major competitor had reduced its prices in the area, and a newspaper advertisement by a food chain customer served by that competitor tended to confirm this report (R. 3371-91, 3578, 3604-12).

39. In arguing that the defense has "the burden of coming forward with the evidence on meeting competition" and that the government need not "negative . . . possible justifications" (Brief in Opposition, note 34, *supra*, p. 19), government counsel repudiated entirely the earlier representations to this Court in its constitutionality appeal that petitioner was charged with selling "at less than [its] own costs, *without reasonable justification*," and "[u]nless the government proves this misconduct there must be an acquittal" (see Government Brief on Reargument, note 33, *supra*, p. 18; emphasis added).

Notwithstanding this background, the trial court placed upon petitioner the burden of establishing a "good faith meeting competition defense" (App. A-290). His meeting competition instructions obviously were adopted from the affirmative defense contained in Section 2(b) of the Robinson-Patman Act amendment to the civil Clayton Act. This was totally erroneous, for it is only "at any hearing . . . under this section," and only upon a "person charged with a violation of this section" (*i.e.*, Section 2, the civil section) that Section 2(b) places the burden of showing justification upon a seller.[40]

Moreover, in instructing that the competitive price being met must be "lawful" and "in fact . . . in existence,"[41] the trial court attached conditions even stricter than those applicable to the Section 2(b) proviso in civil cases. A seller claiming the civil defense under Section 2(b) perhaps must show that he reasonably *believed* that the price he met was lawful,[42] but no case holds that the actual "lawfulness" of a competitor's price must be proved in order to establish even a civil meeting competition defense, and the proposition that Section 2(b) requires a seller to show that he "in fact" met a competitive price was specifically rejected by this Court in *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759 (1945).

The trial court added to the already heavy burden he

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40. See App. A-154—A-155.

41. See App. A-288, A-289, A-290, A-293, A-295. Although this Court had referred to the "need to meet a lawful, equally low price of a competitor" (372 U.S. at 36-37; App. A-151), this clearly was given an *example* of a "legitimate commercial objective" and was not intended to establish a standard for every meeting competition question.

42. See Att'y Gen. Nat'l Comm. Antitrust Rep. 181 (1955); Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956).

had placed upon petitioner by cautioning the jury that testimony claiming "meeting competition" as justification was "simply a conclusion . . . of the witness" and a "mechanical word formula,"[43] and he confusingly compared the gasoline business (where there was a known differential between "name brand" gasolines and others) to the milk business (where there was no evidence of any established differential between milk in different containers).[44]

The Court of Appeals' opinion upholding the trial court's instructions did not mention petitioner's contentions (which were strongly opposed by the government) on the "meeting competition" question, and the serious issues raised thereby remain unresolved.

As a criminal statute, Section 3 must be strictly construed.[45] Over-all, the trial court's Robinson-Patman instructions, approved by the Court of Appeals, not only do violence to this principle but raise serious and novel questions concerning the administration and application of Section 3.

Unless this Court shall act, the rules that a seller is suspect if he fails to make a net profit; that a jury, looking at competitive effects, may presume that a seller has anticompetitive motives; and that a seller may have to prove his innocence under strained and unrealistic standards governing "meeting competition," cannot help but deter price competition and thereby contravene basic antitrust policy. See *Auto-*

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43. See App. A-288, A-289.

44. See App. A-292—A-293. Arguing that there *ought to be* some differential, the government conceded in the Court of Appeals that "there was not unanimity as to what the differential should be. . . ." (Brief for Appellee United States, note 8, *supra*, p. 130 n. 110).

45. See United States v. Boston & Maine R.R., 380 U.S. 157 (1965).

matic Canteen Co. v. *FTC,* 346 U.S. 61, 63, 73-74 (1953); *Northern Pac. Ry.* v. *United States,* 356 U.S. 1, 4 (1958).

For the reasons hereinabove set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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